In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 663

ANNE C. SKEELES, ADMINISTRATRIX OF ESTATE OF WILLIAM E. SKEELES, DECEASED, AND ANNE C. SKEELES, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 10-21) is reported at 95 F. Supp. 242.

JURISDICTION

The judgment of the court below was entered on February 6, 1951 (R. 21). The petition for a writ of certiorari was filed on April 6, 1951. The juris-

diction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTION PRESENTED

Whether losses from wagering transactions in excess of the gains from such transactions can be net operating losses within the meaning of that term in Section 122(a) of the Internal Revenue Code, which, under subsection (b), can be carried over or carried back and allowed as deductions in computing taxable income in the succeeding or preceding year.

STATUTES INVOLVED

The applicable portions of the pertinent statutes are set forth in the Appendix, *infra,* pp. 9-12.

STATEMENT

The special findings of fact of the Court of Claims (R. 10-12) may be summarized as follows:

The petitioner, Anne C. Skeeles, instituted one suit as the administratrix of the estate of William E. Skeeles, deceased, and another suit in her individual capacity. She is the surviving wife of William E. Skeeles who died on July 10, 1947. During the lifetime of William E. Skeeles, separate returns of community income were filed by him and his wife. (R. 10-11.)

From 1936 to his death, William E. Skeeles was engaged in gambling and wagering transactions, and during the years 1940, 1941 and 1942, his sole source of income and that of his wife was from his

gambling and wagering transactions, conducted for his own account and with others, on the outcome of horse racing, football and baseball games, prize fights, card and dice games. All of these activities were conducted by Mr. Skeeles for the purpose of profit, but they were in violation of the ordinances of the city of Shreveport, Louisiana and the laws of that state. (R. 11.)

William E. Skeeles and his wife filed federal income tax returns on the community property basis, to which returns there were attached schedules showing the source of income, the deductions and net income or loss. For the year 1940, a net loss of $12,200.69 was determined, which amount was the excess of gambling losses over gambling gains in that year. For the year 1941, the gambling gains in excess of the gambling losses were determined to be $83,674.29, after the claimed 1940 net loss deduction was denied. For the year 1942, a community net loss was determined of $66,570.98, which was the excess of gambling losses over gambling gains for that year.

William E. Skeeles and his wife each filed a claim for refund for the year 1941, claiming thereon that they were entitled to a carry-back of the 1942 net operating loss and to apply it as a deduction to 1941 net operating gains under Section 122 of the Internal Revenue Code. These claims were rejected and the disallowance notices were dated January 29, 1947. (R. 11-12.)

By reason of the disallowance of the deduction from 1941 income of the 1940 net wagering losses, the Commissioner of Internal Revenue determined deficiencies against William E. Skeeles and Anne C. Skeeles which were subsequently paid. Under date of November 3, 1947, Anne C. Skeeles, as administratrix of the estate of William E. Skeeles, filed a claim for refund of taxes paid by her deceased husband for the year 1941, claiming a right to deduct from 1941 income the net loss sustained in 1940. On the same date, she filed a similar claim on her own behalf. (R. 12.)

No action having been taken by the Commissioner on these claims (R. 12), suit was filed in the Court of Claims (R. 1-9). That Court, on February 6, 1951, found petitioner not entitled to recover and dismissed her petitions (R. 21).

ARGUMENT

1. To be entitled to a "carry-back" or "carry-over" under Section 122(b) of the Internal Revenue Code, a taxpayer must establish that he has a "net operating loss" within the meaning of Section 122(a). See Appendix, *infra,* p. 10. Section 122(a) defines "net operating loss" as "the excess of the deductions *allowed* by this chapter over the gross income * * *". [Italics supplied]. And so the question that must be put is whether wagering losses in excess of wagering gains are "deductions allowed".

Section 23(h) supplies a clear answer to that question. It specifically states that "Losses from wagering transactions shall be *allowed* only to the extent of the gains from such transactions." [Italics supplied.] Hence the Court of Claims was plainly correct in denying the "carry-backs" and "carry-overs" here sought.

2. To contend, as petitioner does, that wagering, having been Mr. Skeeles' sole income-producing activity in 1940-1942, was his trade or business, and that losses therefrom are deductible under Section 23(e) (Appendix, *infra,* p. 9) is to frustrate the effectiveness of Section 23(h) with respect to taxpayers whose sole activity is gambling. Moreover, Congress, in Section 23(h), drew no distinction between amateur or professional and full-time wagering. On the contrary, the history of Section 23(h) demonstrates a Congressional purpose to gather all wagering transactions into a class of their own in order to determine the extent to which wagering losses shall be deductible.

The Revenue Acts, prior to the year 1934, contained no specific provisions dealing exclusively with the allowance or disallowance as deductions from taxable income of losses sustained from wagering transactions. Prior to 1934, the Board of Tax Appeals decided that, under the provisions allowing deduction for losses sustained in transactions entered into for profit, illegal wagering losses could be taken as a deduction to the extent

of gains from such transactions. *Simms* v. *Commissioner,* 28 B.T.A. 988; *Frey* v. *Commissioner,* 1 B.T.A. 338; *McKenna* v. *Commissioner,* 1 B.T.A. 326. However, it had been ruled that losses from legalized wagering were deductible in full provided such wagering was entered into for profit. G.C.M. 10873, XI-2 Cum. Bull. 85 (1932); S.M. 2680, III-2 Cum. Bull. 110 (1924); I.T. 1865, II-2 Cum. Bull. 125 (1923). See also *Beaumont* v. *Helvering,* 73 F. 2d 110 (C.A. D.C.), certiorari denied, 294 U.S. 715; *Cronan* v. *Commissioner,* 33 B.T.A. 668.

In the Revenue Act of 1934, Congress inserted a new provision (Section 23(g), now Section 23(h) of the Internal Revenue Code, Appendix, *infra,* pp. 11-12) to the effect that losses from wagering transactions shall be allowed only to the extent of gains from such transactions. The primary reason for the addition of this new provision was to limit deductions for losses from legalized wagering and to permit the deduction of such losses only to the extent of gains from such transactions, thus placing the deductibility of such losses on the same plane as the deductibility for illegal wagering. H. Rep. No. 704, 73d Cong., 2d Sess., p. 22 (1939-1 Cum. Bull. (Part 2) 554, 570) copied in the footnote at pages 19 and 20 of the Record.

Moreover, Section 23(e)(1) is a general clause in the Internal Revenue Code providing for business losses generally by an individual, whereas Section 23(h) is a special clause providing for

wagering transactions specifically. It is a well-established rule of interpretation that the special statute limits the general. *Clifford F. MacEvoy Co.* v. *United States,* 322 U.S. 102; *D. Ginsberg & Sons, Inc.* v. *Popkin,* 285 U.S. 204; *Rodgers* v. *United States,* 185 U.S. 83. Also, where two provisions in the same statute give rise to doubt, or are in any way conflicting, the doubt will be resolved in favor of the later expression. *Reynolds* v. *United States,* 95 C. Cls. 160.

3. Petitioner refers the Court to, and we have been unable to find, no other case in which the issue was whether wagering could constitute a "trade or business" under Section 23(e)(1) or any like provision of law. Hence, there can be no conflict of decisions. In both *Neuberger* v. *Commissioner,* 311 U. S. 83 (not a wagering case at all), and *Jennings* v. *Commissioner,* 110 F. 2d 945 (C.A. 5), it was held only that losses sustained by the taxpayers in their individual capacity were allowable as deductions to the extent of their proportionate share of gains from like transactions by the partnership of which they were members. It was stated in the opinions that under the federal taxing Acts a partnership is merely an income computing unit and not a separate taxable entity such as a corporation, and that partnership income is reportable as the individual income of the partners thereof.

In *Humphrey* v. *Commissioner,* 162 F. 2d 853 (C.A. 5), the court held that all wagering trans-

actions were gathered into a class of their own under Section 23(h) of the Code and were dealt with as provided by such subsection. That the court below followed the decision of the Fifth Circuit is evident by its statement (R. 20), "We feel that the quotation from the opinion of the majority in the *Humphrey* case, *supra,* correctly states the law".

CONCLUSION

The judgment of the court below is correct, there is no conflict, and no other reason for review by this Court. Hence, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 1951.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

* * * * *

(h) *Wagering Losses.*—Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.

* * * * *

(s) [as added by Section 211(a), Revenue Act of 1939, c. 247, 53 Stat. 862] *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

* * * * *

(26 U. S. C. 1946 ed., Sec. 23.)

SEC. 122 [as added by Sec. 211(b), Revenue Act of 1939, c. 247, 53 Stat. 862]. NET OPERATING LOSS DEDUCTION.

(a) *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions and limitations provided in subsection (d).

(b) [as amended by Sec. 153(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Amount of Carry-back and Carry-over.*—

(1) *Net Operating Loss Carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

(2) *Net Operating Loss Carry-over.*—If for any taxable year the taxpayer has a net operating loss, such net operating loss shall

be a net operating loss carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the intervening taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such intervening taxable year without regard to such net operating loss and without regard to any net operating loss carry-back. For the purposes of the preceding sentence, the net operating loss for any taxable year beginning after December 31, 1941 shall be reduced by the sum of the net income for each of the two preceding taxable years (computed for each such preceding taxable year with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and computed by determining the net operating loss deduction without regard to such net operating loss or to the net operating loss for the succeeding taxable year).

* * * * *

(26 U.S.C. 1946 ed., Sec. 122.)

Revenue Act of 1934, c. 277, 48 Stat. 680, 688:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(g) *Wagering Losses.*—Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.

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